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In Pennsylvania, by the Act of 14th April 1851, it is made a misdemeanor for any person connected with any line of telegraph to use or make known the contents of a despatch without the consent or direction either of the party sending or the party receiving it. In *Henisler v. Freedman*, 2 Parsons 274, it was held that this act did not apply to cases where such disclosure should be-

come material on a trial in a court of justice. And by subsequent statute (8th May 1855) it is made the duty of telegraph companies to preserve the originals of all messages (other than those intended for publication) for at least three years, and to produce them in evidence when properly subpoenaed.

I. F. R.

United States District Court, District of Rhode Island.

MANCHESTER ET AL. v. HOTCHKISS.¹

A service of a libel in a proceeding *in personam* on a maritime contract, against a citizen of another district by attachment of his property, is a good service and the court obtains jurisdiction.

A defendant does not waive his right to object to the jurisdiction of the court in an admiralty proceeding by filing a stipulation for costs and to abide the decree of the court, &c., under Rule 4 in Admiralty.

THIS was a libel in admiralty by Manchester *et al.*, citizens of the district of Rhode Island, against Hotchkiss, a citizen of the district of Connecticut. The marshal returned that for want of the body of the within-named George Hotchkiss, to be by him found within this district, he had on March 8th 1871, attached all the right, title, and interest that the said George Hotchkiss had in and to the schooner George Hotchkiss.

The respondent on March 10th entered a claim to the schooner, and on the same day he also filed a stipulation for costs, together with a stipulation in conformity with the fourth rule in Admiralty, —whereupon the schooner was surrendered to him, and the attachment dissolved by operation of law.

On the return-day of the writ the respondent filed a plea and answer, to which libellants replied.

Browne & Vanslyck, for libellants.

A. Payne and J. C. Pegram, for respondents.

¹ See post p. 383.

KNOWLES, D. J.—The respondent in his plea and answer, in the first place avers and insists that the court has no jurisdiction of the cause, because the defendant is not, nor was he at the filing of the libel, a citizen or resident of the district of Rhode Island, and the only service ever made of said libel was by attaching the goods and chattels of the defendant within the district of Rhode Island, the paragraph closing with these words: "Saving and reserving all benefit and advantage from said plea, and if overruled, the said defendant makes answer to said libel, and alleges and articulately propounds," &c., &c.

To this the libellants reply, "that the respondent's plea to the jurisdiction of the court ought not to be received and accredited, because, before the offering of said plea, said defendant had submitted himself and the cause to the jurisdiction of the court, by entering into and filing in the clerk's office of the court his stipulation to abide by and perform all the decree of the court in said cause, and had submitted himself and his cause to the jurisdiction of the court by filing an answer in said cause to the merits thereof." And to this the libellants further replying, add that the plea is bad and insufficient in law.

In passing upon one of the two questions here presented, it seems necessary to say but little. Conceding that a defendant may waive a personal privilege, and estop himself from denying the jurisdiction of a Court of Admiralty, it still is incumbent on a libellant to show satisfactorily that a waiver was made by the defendant. This is not shown in this case. The filing of a stipulation, in order to release the vessel from attachment, I cannot regard as a waiver of any right or ground of defence to the suit; and as in this "answer and plea," filed on the return-day of the writ, the day when, and not prior to which, he was entitled and bound to appear in court and answer, he sets forth his objections to the jurisdiction, I am constrained to adjudge that objection seasonably presented: *The Bee*, Ware 332. In neither text book nor reported case do I find aught inconsistent with this ruling.

In regard to the other of the two questions, though much might properly be said, were it now for the first time presented for judicial action, little, as it seems to me, needs be said in this connection.

That question, it must be agreed, in its last analysis, is simply

this: Is a libel suit *in personam* in Admiralty a "civil suit" within the meaning of the 11th section of the Judiciary Act of 1789? (1 Stat. at L. 78).

Now, to this question distinctly raised, a negative answer was given in 1867, in an elaborate and exhaustive opinion by Judge BENEDICT, of the Eastern District of New York,—1 Benedict 118—and an affirmative answer was recently given by Judge SHERMAN, of the Northern District of Ohio, in an opinion not less elaborate.¹ There is reason to believe, too, that by the late Justice McLEAN, of Ohio, by Judge HOFFMAN, of California, by Judge SHIPMAN, of Connecticut, and by Judge WOODRUFF,² of the second circuit (overruling the decision in 1 Benedict), opinions in harmony with that of Justice SHERMAN have been delivered within the twenty years past. Of these six opinions, however, I have as yet been able to find only those of Judges BENEDICT and SHERMAN; but in these, I incline to believe, will be found embodied all the leading arguments and suggestions which give countenance to the conclusions to which, after full argument and deliberation, they respectively arrived. The weight of authority, numerically considered, it is seen, is in favor of the affirmative conclusion.

But this, it is contended on behalf of the libellant, is not to be allowed to control my judgment. There are, it is argued, other facts to be considered: 1. That the Admiralty Rules Nos. 2, 3, and 4, framed by the Supreme Court, are consistent only with the rulings of Judge BENEDICT, and are "without law and against law," if his construction of the statute of 1789 be not sound. 2. That in all the text-books and manuals of admiralty practice now in daily use by the profession, a service of a writ in admiralty by attachment of goods and chattels merely, irrespective of the residence or presence of the defendant, is treated and prescribed as a legal and sufficient service. 3. That throughout the United States, save in the Districts of California, Ohio, Connecticut, and New York, a service by attachment only (irrespective of a defendant's residence) is held to be valid and effectual; and, 4. That from 1789 down to 1852, so far as can be learned, not even an intimation that such a service was objectionable or questionable, was ever heard from bench or bar; that as early as 1841 (1 Story

¹ Reported, post, p. 383.

² Reported, post, p. 389.

531), Justice STORY, in his opinion in a Rhode Island cause, said, in ruling upon a cognate question: "Neither has it been doubted that the process of attachment well lies in an admiralty suit against the property of private persons, whose property is found within the district, although their persons may not be found therein, as well to enforce their appearance to the suit, as to apply it in satisfaction of the decree rendered in the suit. Ever since the elaborate examination (in 1825) of the whole subject in the case of *Manro v. Almeida*, 10 Wheat. 473, this question has been deemed entirely at rest." And that in harmony with this *dictum* of Justice STORY, as a declaration of settled law, has ever been the practice and usage throughout the circuit, whoever at the bar, whoever upon the bench.

To the force of the libellant's reasoning on this point, I am constrained to yield. No decision of the Supreme Court or of the circuit judge of this district, in support of the defendant's plea to jurisdiction is produced, while *dicta*, if such merely they be, both from the 10th Wheaton and 1st Story are produced, impliedly overruling such a plea. I find a practice and usage established in this district, in harmony with the dicta of judges to whose *opinions* I should be bound to defer, and in harmony with rules ordained by the Supreme Court, to which the force of statutes is universally conceded. If this practice and usage is to be abandoned as grounded on a misconception on the part of practitioners, text-writers and judges, of a statute enacted in 1789, and still in force, I prefer that the decree to that effect shall issue from the Supreme or the Circuit Court rather than from this.

A sufficient ground for a judgment overruling the defendant's "exceptive plea" is found in the usage and practice in this circuit from 1789 downwards, and in the acts and declarations of its judges under the Rules in Admiralty to which I have referred, framed by the Supreme Court, in 1842, and yet in full force. Such a ground, moreover, I do not hesitate to add is found in the opinion of Judge BENEDICT in the case cited. That opinion, it is said, has been overruled by the learned judge of the Second Circuit (WOODRUFF), and as we have seen, in certain districts, the adverse doctrine has been promulgated from the bench; but until better informed than I at present am as to the reasons assigned for dissenting from the conclusions of Judge BENEDICT, I am

inclined to concur in and adopt those conclusions—especially these : says Judge BENEDICT :—

“When the District Courts were constituted Courts of Admiralty, they acquired the right to those methods and modes of proceeding which are the life of the admiralty, and among which has from the first been the power to seize property of defendants who cannot be found and to compel an appearance. This power is recognised by the admiralty rules as existing in these courts ; it has never been conferred upon any other tribunal, and any intention to place it in abeyance, or to limit its exercise, when entertained by the law-making power, will, it may well be supposed, be clearly expressed, and not left to be inferred from the use of a general and indefinite phrase. * * * If either from changes in the habits of commerce, or from modifications which are found necessary and become fixed in the practice of Admiralty Courts of other countries, or from changes in the spirit of our institutions, a limitation of the mode of exercising this power shall become necessary or proper, it is not to be doubted that the Supreme Court, as the high appellate Court of Admiralty, and as empowered by the Act of 1842, will effect a change in this particular, as it most properly did in regard to the power of imprisonment.”

The defendants’ “exceptive allegation or plea” to the jurisdiction of the court is overruled, and the case will stand for hearing upon its merits.

United States District Court, Northern District of Ohio.

N. E. INSURANCE CO. v. DETROIT AND CLEVELAND STEAM NAVIGATION CO.¹

Service of a libel *in personam* in a maritime cause, in the admiralty court of one district, upon a citizen of another district by attachment of his property, is not a good service and confers no jurisdiction.

THIS was a libel *in personam* filed to recover damages caused by the collision of the steamboat Morning Star and the bark Cortlandt, on Lake Erie. The defendant was a corporation under the law of Michigan, having its business office at Detroit, and running a line of steamers from that port to Cleveland.

¹ See ante, p. 379, and post, p. 389.